MUSTAKIM CHEK MAN

v.

PP

COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI JCA
HASAN LAH JCA
JEFFREY TAN JCA
[CRIMINAL APPEAL NO: W-05-97-2005]
23 SEPTEMBER 2009

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(2) - Trafficking in cannabis - Appeal against conviction and sentence - Accused's statements to police, admissibility of - Information leading to fact discovered - Whether accused had possession of cannabis - Whether there was insufficient evidence to convict - Evidence Act 1950, s. 27*

CRIMINAL PROCEDURE: *Statements - Admissibility - Accused's statements to police - Whether actual words spoken by accused established - Whether alleged information led to discovery of fact - Evidence Act 1950, s. 27*

EVIDENCE: *Statement - Admissibility - Accused's statement to police - Whether actual words spoken by accused established - Whether alleged information led to discovery of fact - Evidence Act 1950, s. 27*

EVIDENCE: *Information leading to fact discovered - Admissibility of statement - Accused's statement to police - Whether actual words spoken by accused established - Whether alleged information led to discovery of fact - Evidence Act 1950, s. 27*

EVIDENCE: *Improper admission of evidence - Failure to object - Inadmissible evidence did not become admissible by reason of failure of defence to object*

The accused/appellant was charged with trafficking in 2,056.3 grams of cannabis, an offence punishable under s. 39B(2) of the Dangerous Drugs Act 1952 ('DDA') with death. At the close of the prosecution's case, the trial judge held that a *prima facie* case had been made out and ordered the appellant to enter his defence. At the end of the entire case, the trial judge convicted the appellant. Hence, the present appeal by the appellant against that decision.

The appellant was arrested by the police at a car park outside a flat ('said flat') he was sharing with his sister and her husband. Chief Inspector Azizan Ibrahim ('SP5') read the caution under s. 37A of the DDA to the appellant, and then questioned him. SP5 asked the appellant whether he had any incriminating articles to which the appellant replied in the affirmative. The appellant then led the police to the said flat, where the proscribed drugs were found inside a "Microsoft Office 97" bag ('Microsoft bag') from a bedroom ('Room E2') and inside a red plastic packet from a drawer of a display cupboard in the hall. The appellant's oral statements to SP5 in the car park were recorded on a piece of paper, which was admitted as exh. P29 ('P29'), apparently, without any objection from the defence. The trial judge's subsequent admission of the appellant's oral statements under s. 27 of the Evidence Act 1950 ('Act') was the main issue on which this appeal revolved.

Held (allowing the appeal)
Per Jeffrey Tan JCA delivering the judgment of the court:

(1) P29, on the facts, would not pass the stringent conditions for admission. First of all, the confessional content in P29 must be discarded. As for the rest of P29, there was uncertainty as to the actual words that were spoken by the appellant at the car park. The testimony of SP5 pertaining to the appellant's oral statements was also very different from what was stated in P29. Furthermore, even if the alleged information was as stated in P29, it had not led to the discovery of a fact. Thus, since the actual words of the appellant were not clearly established and the alleged information in any case did not relate distinctly to the fact discovered, s. 27 of the Act, consequently, could not be invoked. Although the trial judge stressed that the defence did not object to the admission of P29, inadmissible evidence does not become admissible by reason of failure to object, and since the alleged information could not be admitted the evidence of the appellant's actions in taking out the Microsoft bag and the red plastic packet was of little value. (paras 10-13)

(2) To prove possession of the proscribed drugs, the prosecution had to prove that the appellant had exclusive possession of the said flat and/or Room E2. However, exclusive possession of the said flat was not proven as the appellant did not occupy it

alone, and without proof of exclusive possession of the said flat, there was simply no case of possession of the red plastic package from the display cupboard in the hall. Exclusive possession of Room E2 was also not proven. The Microsoft bag was taken from Room 2E but it was not proven that Room 2E was the appellant's room. At the very most, the evidence of possession of the Microsoft bag and its contents was by inference alone which, in a capital offence, was not enough to support a conviction without the element of control. (paras 14-15)

(3) Given the state of the total evidence and the doubt as to the information evidence, had the appellant remained silent, there was insufficient evidence to convict. Hence, the appellant's defence should not have been called. (para 16)

[Conviction and sentence imposed upon appellant set aside, and appellant acquitted and discharged.]

Bahasa Malaysia *Translation Of Headnotes*

Tertuduh/perayu telah dituduh mengedar 2,056.3 gram kanabis, suatu kesalahan yang boleh dihukum di bawah s. 39B(2) Akta Dadah Berbahaya 1952 ('ADB') dengan hukuman mati. Pada penutup kes pendakwaan, hakim perbicaraan mendapati bahawa suatu kes *prima facie* telah dibuktikan dan mengarahkan perayu untuk memasukkan pembelaannya. Pada penghujung keseluruhan kes, hakim perbicaraan menyabit perayu. Oleh yang demikian, rayuan semasa oleh perayu terhadap keputusan tersebut. Perayu telah ditangkap oleh polis di sesuatu medan kereta di luar sebuah pangsapuri ('pangsapuri tersebut') yang beliau berkongsi dengan kakaknya dan suami kakaknya. Ketua Inspektor Azizan Ibrahim ('SP5') membaca amaran di bawah s. 37A ADB kepada perayu, dan kemudian menyoalnya. SP5 bertanya perayu sama ada beliau menyimpan apa-apa barang salah dan perayu jawab secara afirmatif. Perayu kemudiannya membawa polis ke pangsapuri tersebut, di mana dadah yang diharamkan telah dijumpai di dalam sebuah beg "Microsoft Office 97" ('beg Microsoft') dari sebuah bilik tidur ('Bilik E2') dan di dalam sebuah paket plastik merah dari laci sebuah almari pameran dalam ruang depan. Pernyataan lisan perayu kepada SP5 di medan kereta telah ditulis atas sehelai kertas, yang

telah dibenarkan masuk sebagai eks. P29 ('P29'), nampaknya, tanpa apa-apa bantahan dari pembelaan. Penerimaan kemudiannya pernyataan lisan perayu oleh hakim perbicaraan di bawah s. 27 Akta Keterangan 1950 ('Akta') merupakan isu utama atas mana rayuan ini berkisar.

Diputuskan (membenarkan rayuan)
Oleh Jeffrey Tan HMR menyampaikan penghakiman mahkamah:

(1) P29, berdasarkan fakta, tidak akan lulus syarat-syarat ketat bagi penerimaan. Pertamanya, kandungan P29 yang bersifat pengakuan mesti dibuang. Bagi P29 yang tinggal, terdapat ketidakpastian mengenai perkataan-perkataan yang sebenarnya disebut oleh perayu di medan kereta. Testimoni SP5 berhubungan dengan pernyataan lisan perayu juga amat berbeza dari apa yang dinyatakan dalam P29. Lagipun, jikapun maklumat yang dikatakan itu adalah seperti yang dinyatakan dalam P29, ia tidak membawa kepada penemuan suatu fakta. Oleh itu, disebabkan perkataan-perkataan sebenar perayu tidak dapat dibuktikan dengan jelas dan maklumat yang dikatakan tidak berkait dengan jelas kepada fakta yang dijumpai, s. 27 Akta, akibatnya, tidak dapat digunakan. Walaupun hakim perbicaraan menekan bahawa pembelaan tidak membantah kepada penerimaan P29, keterangan yang tidak boleh diterima tidak menjadi boleh diterima disebabkan kegagalan untuk membantah, dan oleh kerana maklumat yang dikatakan tidak dapat diterima keterangan mengenai tindakan perayu mengeluarkan beg Microsoft dan paket plastik merah tidak bernilai.

(2) Untuk membukitkan milikan dadah yang diharamkan, pendakwaan mesti membuktikan bahawa perayu mempunyai milikan eksklusif pangsapuri tersebut dan/atau Bilik E2. Walau bagaimanapun, milikan eksklusif pangsapuri tersebut tidak dapat dibuktikan kerana perayu tidak tinggal seorang diri dalamnya, dan tanpa bukti milikan eksklusif pangsapuri tersebut, tidak ada kes milikan paket plastik merah dari almari pameran dalam ruang depan. Milikan eksklusif Bilik E2 juga tidak dapat dibuktikan. Beg Microsoft telah diambil dari Bilik 2E tetapi ia tidak dibuktikan bahawa Bilik 2E adalah bilik perayu. Paling banyak pun, keterangan milikan beg Microsoft dan kandungannya

ialah melalui inferens sahaja yang, dalam suatu kesalahan yang membawa hukuman mati, tidak cukup untuk menyokong sesuatu sabitan tanpa elemen kawalan. A

(3) Memandangkan keadaan keterangan keseluruhan dan keraguan mengenai keterangan maklumat, jika perayu mendiamkan diri, tidak ada keterangan yang mencukupi untuk menyabit. Oleh yang demikian, pembelaan perayu tidak sepatutnya dipanggil. B

[Sabitan dan hukuman yang dikenakan atas perayu diketepikan, dan perayu dibebaskan dan dilepaskan.] C

Case(s) referred to:
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Chan King Yu v. PP [2009] 1 CLJ 601 FC ***(refd)***
Choo Chang Teik v. PP [1991] 3 CLJ 2387; [1991] 1 CLJ (Rep) 54 SC ***(refd)*** D
Goh Beng Seng v. Dol Dolah [1969] 1 LNS 46 HC ***(refd)***
Gooi Loo Seng v. PP [1993] 3 CLJ 1 SC ***(refd)***
Hamiron Mat Udin & Ors v. PP [1947] 1 LNS 32 HC ***(refd)***
Hasamuddin Talena v. PP [2002] 2 CLJ 504 CA ***(refd)***
Krishnan Ramar v. PP [1987] 1 CLJ 28; [1987] CLJ (Rep) 145 SC ***(refd)*** E
Ooi Lean Chai v. PP [1991] 2 CLJ 1304; [1991] 1 CLJ (Rep) 337 SC ***(refd)***
Pang Chee Meng v. PP [1992] 2 SCR 1 ***(refd)***
PP v. Toh Ah Keat [1976] 1 LNS 118 HC ***(refd)***
Sandra Margaret Birch v. PP [1977] 1 LNS 114 HC ***(refd)***

Legislation referred to: F
Dangerous Drugs Act 1952, ss. 37A, 39B(2)
Evidence Act 1950, s. 27

Other source(s) referred to:
Augustine Paul, *Evidence, Practice & Procedure,* 2nd edn, p 258 G

For the appellant - Gurbachan Singh; M/s Bachan & Kartar
For the respondent - Suzana Atan DPP; AG's Chambers

Reported by Suresh Nathan

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JUDGMENT

Jeffrey Tan JCA:

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[1] The amended charge against the appellant was that he, at 9pm on 21 January 2001 in house No. 90-05-02, Flat Putra Ria, Jalan Bangsar, in the district of Brickfields in the Federal Territory

A of Kuala Lumpur, committed the act of trafficking in a dangerous drug, to wit 2,056.3 grams of cannabis, an offence punishable under s. 39B(2) of the Dangerous Drugs Act 1952 (DDA) with death.

[2] At the close of the prosecution case, the learned trial judge
B held that a *prima facie* case had been made out. The appellant was ordered to enter upon his defence. At the end of the entire case, the learned trial judge held that there was no doubt as to guilt, and convicted the appellant. Against that decision, the appellant appealed.

C **[3]** The facts of the case could be summarised as follows. On the night of 21 January 2001, police were out on crime prevention duties in the vicinity of Flat Putra Ria, Jalan Bangsar. There, SP4 (Chief Inspector Benedickson Avina Anak Jekes) arrested the appellant. SP4 handed the appellant to SP5 (Chief Inspector R.
D Azizan Ibrahim). Also there, at the car park, SP5 first read the caution under s. 37A of the Dangerous Drugs Act 1952 to the appellant, and then questioned the appellant. SP5 asked the Appellant for his address. The appellant gave his address as 90-05-
E 02, Flat Putra Ria (flat). The appellant informed SP5 that his sister (SP9) and her husband (SP10) also lived in the flat. The appellant surrendered two keys to SP5. SP5 asked the appellant whether he had any incriminating articles. The appellant answered in the affirmative. "Saya juga ada tanya kepada OKT samada menyimpan
F apa-apa barang salah, lalu OKT menjawab ada" (see p. 21 of the notes of proceedings). The appellant then led the police party to the flat. The appellant opened the grille door with one of the keys that he had earlier handed to SP5. SP5 and the police party together with the appellant in handcuffs entered the flat. From Room E2,
G the appellant took out a "Microsoft Office 97" bag and handed it to SP5 – "Selepas dipandu arah oleh OKT yang dalam keadaan bergari, ke dalam bilik tidur itu OKT telah mengambil satu beg hitam jenama Microsoft Office 97, lalu OKT serah kepada saya dengan disaksikan polis-polis yang hadir" (see 21NP). That bag
H contained a compressed block of cannabis and two clear plastic packets. The appellant then led the police party to the guest hall. There, the appellant took out a red plastic packet from a drawer of the display cupboard in the hall. In that red plastic packet was a newspaper package. SP5 again read the s. 37A caution to the

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appellant. SP5 asked the appellant about the contents of that newspaper package. Incidentally, all evidence of the oral statements of the appellant after the 2nd caution, that is, when the appellant was in the flat, was withdrawn by the prosecution (see 66NP). A

[4] The prosecution also adduced evidence from SP9 that SP9 and SP10 also lived in the flat, that the appellant had his clothes in Room E2, that guests of the family and friends of the appellant had stayed in that room and in another unoccupied room in the flat, and that SP9 and SP10 were in Ipoh on the material date, and from SP8 (Chief Inspector Mohd Slpiyang) that he heard the appellant saying to SP5 at the car park that there were 2 kilograms of cannabis in the flat. B C

[5] In relation to those drug exhibits, a government chemist (SP3 – Nazaruddin bin Mohamed) testified that the compressed block and two clear plastic packets from the Microsoft Office 97 bag and the newspaper package contained a total of 2,056.3 grams of cannabis. D

[6] The above summary would not be complete without a further word on the all important oral statements of the appellant at the car park. SP5 testified that he recorded those oral statements on a piece of paper. That piece of paper was admitted as exh. P29, apparently, without any objection by the defence. In effect, P29 would substantiate the fact of the alleged oral statements of the appellant. E

[7] The learned trial judge admitted the aforesaid oral statements of the appellant under s. 27 of the Evidence Act 1950 (see 66NP and 68NP). But "… for s. 27 … to apply, the information must be such as has caused the discovery of a fact. In other words the fact must be the consequence and the information the cause of its discovery … the information must relate distinctly to the fact discovered" (*Wai Chan Leong v. PP* [1989] 3 MLJ 356). "… in order for the section to apply there must be evidence of the information upon which the fact was discovered" (*Evidence, Practice & Procedure,* 2nd edn by Augustine Paul, at p. 258). "… the first step which must be taken before s. 27 can be invoked at all must be proof of some fact discovered as a result of the information given by the accused" (*Hamiron Mat Udin & Ors v. PP* [1947] 1 LNS 32 per Murray-Aynsley; see also *Pang Chee Meng v. PP* [1992] 2 SCR 1, where it was held that emphasis is placed on the fact discovered and not on the information, for the fact discovered confirms the truth of the information). F G H I

[8] "Section 27 is not intended to let in a confession generally and not one word more of the information which the accused supplied should be given in evidence that is strictly necessary to show how the fact which was discovered is connected with accused so as in itself to be a relevant fact against him" (*Krishnan Ramar v. PP* [1987] 1 CLJ 28; [1987] CLJ (Rep) 145, per Wan Sulaiman SCJ). Consequently, courts must guard against the danger of the abuse of s. 27.

[9] In *Hasamuddin Talena v. PP* [2002] 2 CLJ 504, Gopal Sri Ram JCA, as he then was, said as follows:

> Approximations are not permitted. In other words, the exact words spoken by an accused have to be proved. An illustration of that proposition may be found in *Pang Chee Meng v. PP* [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265, where Abdul Hamid Omar LP reminded us of the need for vigilance, to ensure the credibility of evidence by the police personnel in respect of this section, (that is, s. 27) which is so vulnerable to abuse. The rationale for the rule adverted to a moment ago appears in the judgment of Syed Agil Barakbah J (as he then was) in *Birch v. PP* [1978] 1 MLJ 72. This is what he said:
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> > Information leading to the discovery must relate distinctly to the object so recovered and nothing more. Only so much of such information is admissible. Where such information is held to be admissible, the action of the accused which directly leads to such discovery, in this case the act of the appellant in approaching the green bag and opening it, is of little value and ought to be treated with caution as it is prejudicial to the accused. Further, there was no indication one way or the other what had caused the appellant to lead the police there. Whether her intention was to confess her guilt or to indicate Mohd Desa's guilt still remain uncertain. To my mind, since more than one inference has arisen, the inference in favour of the defence ought to be accepted.
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> Since nothing more than the information given by an accused is admissible, it follows that the information must be exact and recorded in the language or words used by the accused. The strictness of the rule in the application appears sufficiently from the following passage in *Sarkar on Evidence* (14th Ed) at p 492:

> Statements made by accused to police officers which are or may be provable under s. 27 should be clearly and carefully recorded. They should be recorded in the first person, that is to say, as far as possible in the actual words of the accused. They should not be paraphrased (*In Re Athappa Goundan* AIR [1937] Mad 618; *Re Ramamurthy* AIR [1941] M 290; *Naresh v. R* 46 CWN 180; *Public Prosecutor v. Pasala* AIR [1945] Mad 2021; *Public Prosecutor v. Venkoba* [1937] MWN 73; *Chenna v. King Emperor* AIR [1940] Mad 710; *Gaya v. State* AIR [1957] All 459; *Nathuv State* AIR [1958] All 46). No judge should allow one word more to be deposed to by the police than it is absolutely necessary to show how the fact discovered is connected with the accused.

[10] Section 27 … deals with a very special type of statement which even if self-incriminatory is nonetheless admissible under that section provided that the conditions prescribed are strictly complied with" (*PP v. Toh Ah Keat* [1976] 1 LNS 118 per Hashim Yeop A Sani (as he then was). And P29 would not pass the stringent conditions for admission. First of all, the confessional content in P29 must be discarded. As for the rest of P29, there was uncertainty as to the actual words that were spoken by the appellant at the car park. It should be noted that P29 was recorded at the car park (see 68NP). Hence, P29 could only have been the record of the alleged oral statements of the appellant at the car park and not when he was in the flat. It was the testimony of SP5 that he asked the appellant whether he had any incriminating articles (barang salah) and the appellant answered "ada" (see 21NP and 27NP). SP5 agreed that his question was without any specific reference to cannabis, and that "ada" was not any affirmative answer by the appellant that he had cannabis (see 27NP). There was no evidence from SP5 that the appellant had said anything else after the answer "ada" (see 21NP). Immediately after the answer "ada", the police party with the appellant in tow proceeded to the flat (see 21NP). But the account in P29 was very different and less kind to the appellant. The account in P29 was that SP5 asked "Ada apa-apa barang salah yang kamu simpan?" and the appellant answered "Ada 2kg ganja", and that SP5 asked "Dimana kamu simpan?" and the appellant answered "Dalam almari, di bilik dalam rumah saya".

[11] SP5, who was recalled by the prosecution some five months after he had testified, clarified that he had forgotten to say that the appellant answered "Ada 2kg ganja", and that he asked "Dimana kamu simpan?" and the appellant answered "Dalam almari, di bilik

A dalam rumah saya" (see 69NP). But that clarification by SP5 was less than satisfactory, for it was wholly inconsistent with his earlier testimony that "ada" was not any affirmative answer by the appellant that he had cannabis (see 27NP). Suffice it to say that what was actually said by the appellant at the car park was not
B clearly established.

[12] But even if it were true that the alleged information was "Dalam almari, di bilik dalam rumah saya", it had not led to the discovery of a fact. The evidence was that from Room E2 the
C appellant took out a "Microsoft Office 97" bag, and from a display cupboard in the hall the appellant took out a red plastic packet. But there was no evidence that any of the drug exhibits were recovered from a cupboard in a room – "Dalam almari, di bilik dalam rumah saya". The alleged information had not caused the discovery of the
D drug exhibits. Since the actual words of the appellant were not clearly established, and the alleged information in any case did not relate distinctly to the fact discovered, then s. 27 could not consequently be invoked.

E **[13]** The learned trial judge made it a point to stress that the admission of P29 was not objected by the defence (see 99NP and 108NP). But inadmissible evidence "does not become admissible by reason of failure to object" (*Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705 per Edgar Joseph Jr FCJ and cited by the Federal Court
F in *Chan King Yu v. PP* [2009] 1 CLJ 601. "It is the duty of the court to disallow all inadmissible evidence even though no objection is taken to its admissibility. Inadmissible evidence remains inadmissible. It cannot be rendered admissible by failure of counsel to object to it" (*Goh Beng Seng v. Dol Dolah* [1969] 1 LNS 46 per
G Sharma J). "Any admission of inadmissible evidence, even with consent or by waiver of the accused was wrongful and such inadmissible evidence remained inadmissible evidence, the effect of which was open to any court to assess" (*Ooi Lean Chai v. PP* [1991] 2 CLJ 1304; [1991] 1 CLJ (Rep) 337 per Mohammed Azmi SCJ).
H And since the alleged information could not be admitted, then the evidence of the actions of the appellant in taking out the Microsoft bag and the red plastic packet were of little value (see *Sandra Margaret Birch v. PP* [1977] 1 LNS 114, cited with approval in *Hasamuddin Talena v. PP supra*).

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[14] How would the prosecution case stand without exh. P29? The appellant was arrested outside the flat while the proscribed drugs were found inside a bag from a bedroom and inside a red plastic packet from a drawer of a display cupboard in the hall. Unquestionably, the appellant was not in actual physical custody or control of the proscribed drugs. Given so, to prove possession of the proscribed drugs, the prosecution had to prove that the appellant had exclusive possession of the flat and or bedroom. But exclusive possession of the flat was not proved, for the flat was occupied not by the appellant alone. Yes, it could be argued that SP9 and SP10 were away in Ipoh at the time. But then again, it could also be argued that the appellant was also not in the flat at the same time in question. Without proof of exclusive possession of the flat, there was simply no case of possession of the red plastic packet from the display cupboard in the hall.

[15] Exclusive possession of Room E2 was also not proved. The evidence from SP5 was that the Microsoft bag was taken from Room E2 (see 31NP). But it was not proved that Room E2 was the room of the appellant. The evidence from SP9 was that Room E, not Room E2, was the room of the appellant (see 46NP). According to SP9, Room E2 was a guest room (see 46NP) that was not locked (see 48NP) and had been used by guests of the family and friends of the appellant. According to SP10, both Rooms E and E2 were guests rooms (see 51NP). That is not to say though that SP9 and SP10 were entirely hostile to the prosecution. SP9 testified that the clothes of the appellant were kept in Room E2. SP10 testified that the appellant used (tumpang) Room E2 (see 51NP). But that was all that the prosecution had against the appellant. To that, perhaps it could be said that the appellant had knowledge of the drugs, but "mere knowledge … is not sufficient to establish possession" (see *Gooi Loo Seng v. PP* [1993] 3 CLJ 1). Still, all things considered, it did not add up to the primary fact – the exclusive possession of Room E2 – for to infer that the appellant had possession of the articles in Room E2. At the very most, the evidence of possession of the Microsoft bag and its contents was by inference alone. "But in a capital offence, evidence by inference alone is not enough to support a conviction without the element of control" (*Choo Chang Teik v. PP* [1991] 3 CLJ 2387; [1991] 1 CLJ (Rep) 54).

[16] The alleged offence was committed post Amending Act A979 (effective 31 January 1997) but pre Criminal Procedure Code (Amendment) Act 2006 (effective 6 March 2006). The test of a *prima facie* case then was whether there was sufficient evidence to convict, if the accused should elect to remain silent (see *Balachandran v. PP* [2005] 1 CLJ 85). Given the state of the total evidence and the doubt as to the information evidence in particular, had the appellant remained silent, there was insufficient evidence to convict. Hence, defence should not have been called.

[17] It was for those reasons that we, on 30 July 2009, had allowed the appeal, set aside the conviction and sentence, and acquitted and discharged the appellant.